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JUN - 7 1993

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of

TRINITY BROADCASTING OF FLORIDA,
INC.

For Renewal of License of
Station WHFT(TV) on Channel 45,
Miami, Florida

and

GLENDALE BROADCASTING COMPANY

For a Construction Permit for a
New Commercial TV Station to
operate on Channel 45, Miami,
Florida

To: Honorable Joseph Chachkin
Administrative Law Judge

) MM DOCKET NO. 93-75

) File No. BRCT-911001LY

) File No. BPCT-911227KE

OPPOSITION TO MOTION TO DISMISS APPLICATION
OF GLENDALE BROADCASTING COMPANY

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Date: June 7, 1993

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TABLE OF CONTENTS

	Page
SUMMARY	ii
I. INTRODUCTION	1
II. THE TAK SITE AVAILABILITY LETTER	2
III. THE TAK-TBF LEASE	7
A. The Lease Terms7
B. TBF's Abuse of Process.9
C. Glendale's Ability to Construct	11
IV. CONCLUSION	13

Summary

TBF's attempt to have Glendale's application summarily dismissed based upon allegations that Glendale's transmitter site is not available to it must be denied. Glendale timely accepted the offer of TAK Broadcasting, the site owner, to make the site available, and TAK's General Manager has reaffirmed that TAK is willing to negotiate with Glendale. The site is thus available to Glendale.

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TAK and TBF allegedly precludes Glendale from obtaining access to the site for two years after Trinity loses its broadcasting privileges. Neither argument is valid. Glendale has reasonable assurance of site availability, and the TAK-TBC lease provides no basis for dismissing Glendale's application or for even specifying a site availability issue against Glendale. The motion must be summarily denied.

The draconian sanction of dismissal is reserved for cases of "egregious, disruptive, or prejudicial conduct" (Cannon Communications Corp., 6 FCC Rcd 570, 68 RR 2d 1353, 1355 (1991)) or for cases where it is conceded that an applicant is unqualified and the applicant's attempt to cure that defect by amendment has been rejected (see cases cited at Page 7 of

- 3 -

letter dated December 9, 1991 by which TAK stated its willingness to negotiate a site lease with Glendale if

After Glendale received TBF's motion to dismiss and motion to enlarge issues, counsel for Glendale investigated the matter and obtained a signed copy of the letter from Mr. Daly. See Declaration of Lewis I. Cohen submitted as Attachment 2 to this opposition. Counsel then telephoned Mr. Sorensen, who informed counsel that he may have received the letter signed by Mr. Daly but that he had no record of receiving it. Mr. Sorensen then sent counsel a letter in which he stated, inter alia, "TBC will negotiate with anyone else able to and asking to secure tower space, as long as there is no legal or technical impediment to such negotiation or its resulting agreement." Counsel then spoke to David Harris, TAK's General Manager, who orally reaffirmed the December 9, 1991 letter of intent and stated TAK's willingness to negotiate a final agreement with Glendale. See Attachment 2.

Neither Mr. Daly nor George F. Gardner, Glendale's President, had any reason to believe that Mr. Sorensen had not received the fully-signed letter or that the TAK site was unavailable to Glendale until the TBF motions were filed. See Attachment 1 and the Declaration of George F. Gardner submitted as Attachment 3 to this Opposition.¹

Since Glendale accepted TAK's offer in a timely manner, the TAK offer did not expire on January 31, 1992, and Glendale

¹ The original of Mr. Gardner's declaration is attached to Glendale's "Opposition to Contingent Motion to Enlarge Issues Against Glendale Broadcasting Company."

has always had reasonable assurance of site availability. While it is unfortunate that Mr. Sorensen never received the signed letter, the signing and mailing of the letter was a valid acceptance. See Corbin on Contracts, § 78, Pp. 124-125. See also Section 1.47(f) of the Commission's rules, "Service by mail is complete upon mailing." Moreover, TAK's General Manager has reaffirmed the December 9 letter, so Glendale continues to have reasonable assurance of site availability.²

Even if the December 9 letter was deemed to have lapsed, no site availability issue would be warranted. The site was undisputedly available to Glendale when it filed its application in December 1991, and it is available now. In Rancho Mirage Radio, a General Partnership, FCC 90M-2252 (released July 26, 1990) (Attachment 4 to this opposition), the Presiding Judge denied a request for a site availability issue where an applicant had obtained a site availability letter for one piece of land but had erroneously specified a different piece of land in its application. After a petition to enlarge issues was filed, the applicant then obtained reasonable assurance of the site specified in its application. The Presiding Judge refused to specify a site availability issue. He held that the site was currently available to the applicant and that the prior lack of reasonable assurance was

² In his May 15 correspondence, Mr. Sorensen took the position that the original letter was not valid but that TAK was willing to consider entering into a new letter of intent. Mr. Harris, however, reaffirmed the December 9 letter.

caused by a misunderstanding. In this case, any site availability problems were caused by the Post Office's failure to deliver a letter. Since TAK is clearly willing to negotiate with Glendale, it would be inequitable and illogical to add a site availability issue when such an issue was not added in Rancho Mirage Radio.

All that an applicant must show to have reasonable assurance of site availability is "some indication of the property owner's favorable disposition toward making an arrangement with the applicant..." National Innovative Programming Network, Inc. of the East Coast, 2 FCC Rcd 5641, 5643, 63 RR 2d 1534, 1539 (1987). "This reasonable assurance may be acquired by informal telephone contacts by counsel for the applicant, and rent and other details may be negotiated at a yet undetermined future date." Id. Thus, Mr. Harris' oral assurance that the site is available to Glendale is sufficient under the reasonable assurance standard.³ Glendale has met the reasonable assurance standard. Accordingly, there is no basis for concluding that TAK is unwilling to make its site available to Glendale, and TBF's motion must be denied.

³ Under these circumstances, Mr. Cohen's recitation of his telephone conversation with Mr. Harris is cognizable under Section 1.229(d) of the Commission's rules. Mr. Cohen has personal knowledge of the words Mr. Harris spoke to him over the phone. Moreover, Mr. Harris' statement that TAK is willing to negotiate with Glendale is corroborated by the December 9, 1991 letter and Mr. Sorensen's May 15 letter.

III. THE TAK-TBF LEASE

lease may be terminated upon thirty days notice in case of any default. Section 5 of the lease requires TBC to conduct all television broadcasting operations "in accordance with standards imposed by the Federal Communications Commission..." If TBF loses its license, it would not operate "in a lawful and proper manner" as required by the lease. Such an action could clearly constitute a default under the lease that would give TAK the right to terminate the lease. While Section 10 of the lease automatically terminates the lease two years after any proceedings end, that section does not foreclose TAK from finding a default earlier and terminating the lease pursuant to Section 13.

To the extent the lease is ambiguous, TBF has failed to meet the burden imposed by Section 1.229(d) of the Commission's rules for issue enlargement. Questions of property law are within the primary jurisdiction of the civil courts, not the Commission. KOED, Inc., 6 FCC Rcd 625, 626, 68 RR 2d 1074, 1076 (1991). Where, as here, the property owner is willing to negotiate with Glendale, and the lease does not unambiguously support TBF's interpretation, TBF had the burden of obtaining a ruling from a court of competent jurisdiction. The Commission will leave the interpretation of contracts to the civil courts. Ninety-Two Point Seven Broadcasting, 55 RR 2d 607, 610-611 (1984). In the absence of a competent and binding interpretation of the lease, TBF

B. TBF's Abuse of Process

Another strong reason to reject TBF's interpretation of the lease is that its interpretation would be flatly inconsistent with the Commission's expressed public policy supporting competition in broadcast licensing. Indeed, TBF's attempt to use a lease term to deny Glendale access to the TAK Broadcasting site demonstrates TBF's proclivity for abusing the Commission's processes. In Alabama Citizens For Responsive Public Television, Inc., 69 FCC 2d 1062, 43 RR 2d 999 (1978), the Commission was faced with an interim licensee (AETC) that had signed leases with site owners that gave AETC the apparent right to control the sites even after its broadcasting privileges were terminated. When a competitor filed applications mutually exclusive with AETC's applications for regular authority, AETC convinced the Review Board to add a site availability issue against the competitor based upon the leases AETC had entered into.

The Commission granted interlocutory review of the Review Board's action and clearly held that no case or Commission rule supports "the proposition that an incumbent licensee may extend transmitter site leases for the sole purpose of frustrating the application of a competitor." 69 FCC 2d at 1069, 43 RR 2d at 1007. The Commission also wrote:

"Again, it seems to us, AETC may be taking advantage of its position as a licensee, made possible by the special privileges granted by the Commission in the renewal proceeding, to 'freeze out' its competitor."

"On their face, the justifications advanced by AETC for its actions appear unreasonable and unacceptable... We wish to make clear, however, that we invited competing applications because we desired to have a choice of applicants to the extent possible and we do not propose to be deprived of that choice through AETC's taking unwarranted advantage of its position as an interim operator and a licensee."

69 FCC 2d at 1069-1070, 43 RR 2d at 1008. Thus, the Commission clearly held that it is improper for an existing licensee to use a lease term to deny a competitor access to a site owned by a third party once the incumbent loses its license.

TBF's actions are as egregious as the actions AETC took that were found improper in Alabama Citizens. One important difference between Alabama Citizens and this case is the attitude of the site owner. In Alabama Citizens, the site availability issue was necessary because the position of the site owners were ambiguous. See 69 FCC 2d at 1071, 43 RR 2d at 1008-1009. (On the allegations before us, it appears that neither Marengo County nor Taft Broadcasting is actively opposed to making its site available to Alabama Citizens.) Indeed, the Commission held that if the site owners believed that AETC could not block access to the site, no hearing was

The Alabama Citizens case requires the Presiding Judge to reach three conclusions. First, to the extent the Presiding Judge attempts to interpret the lease, he should interpret the lease in a manner consistent with Commission policy (i.e., that the lease could be terminated on thirty days notice if TBF loses its license). Second, even if it is concluded that TBF could block access to the property for two years after it loses its license, TBF's improper action cannot serve as a basis for disqualifying Glendale. Third, TBF's own motion demonstrated that it is attempting to frustrate the

the final order is issued and the time the actual construction permit was issued. For instance, in the Port Huron, Michigan FM proceeding, the final order granting the application was released on July 18, 1990, but the construction permit was not issued until September 3, 1991. Compare the order (Attachment 5 to this opposition) an the construction permit (Attachment 6 to this opposition). To the extent the construction permit was issued after the final order was released, Glendale could obtain access to the site during the original twenty-four month construction period. Thus, while TBF's obstructionist tactics would delay access to the site, the site would not be unavailable to Glendale during the original construction period.

TBF cites Chicagoland TV Co., 8 RR 2d 758, 760-761 (Rev. Bd. 1966) for the proposition that a site availability issue must be specified whenever there will be a two year delay in obtaining access to a site. TBF Motion, P. 5. That case is readily distinguishable from this case. In Chicagoland, the basis for adding a site availability issue was that the applicant would have been unable to use its site unless and until another Commission licensee had moved its antenna to another site which had not yet been constructed. Before the applicant could have obtained access to the site, the other building would have to have been constructed, the existing licensee would have had to make appropriate arrangements with the new building, and a construction permit application would

have to have been filed with and granted by the Commission. The facts concerning the TAK site are completely different. Furthermore, the twenty-four month construction period for television stations was not instituted until well after Chicagoland was decided. See Amendment of Section 73.3598 and Associated Rules Concerning the Construction of Broadcast Stations, 102 FCC 2d 1054, 59 RR 2d 595 (1985).

IV. CONCLUSION

Glendale has reasonable assurance of site availability for the TAK Broadcasting site. TBF has not come close to justifying the draconian remedy of summary dismissal. It has not made a valid case for a site availability issue.⁴

Accordingly, Glendale asks the Presiding Judge to deny the "Motion to Dismiss Application of Glendale Broadcasting Company."

Respectfully submitted,

GLENDALE BROADCASTING COMPANY

By John J. Schauble
Lewis I. Cohen
John J. Schauble

Cohen and Berfield, P.C.
1129 20th Street, N.W., # 507
Washington, D.C. 20036
(202) 466-8565

Its Attorneys

Date: June 7, 1993

⁴ TBF's arguments concerning whether Glendale could show good cause for an amendment are moot. No amendment is necessary.

DECLARATION

I, Gregory B. Daly, under penalty of perjury declare that the following is true and correct to the best of my knowledge.

Using the name TelSA, Inc., (Telecommunications Site Acquisition, Inc.) I have been in the business of acquiring transmitter sites for approximately 10 years. During that period of time, I estimate that I have acquired approximately 5,000 transmitter sites on behalf of clients seeking to file applications with the FCC.

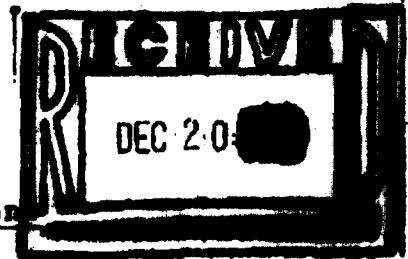
In approximately November 1991, I was retained by Glendale Broadcasting Company (Glendale) to assist it in locating a transmitter site for the application Glendale sought to file for a new television station to broadcast on Channel 45 in Miami, Florida. Upon being retained by Glendale, I made a search of existing transmitter sites and recommended to Glendale that it try to acquire permission to utilize tower space at TAK Broadcasting's facility located at 3300 Pembroke Road, Ft. Lauderdale, Florida.

With the express authorization of Glendale, I negotiated with James L. Sorensen, who identified himself to me as the Tower Manager and Chief Engineer of TAK Broadcasting. I had several telephone conversations with Mr. Sorensen and received from Mr. Sorensen three different Letters of Intent to Negotiate an Agreement. After conferring with Glendale it was finally determined that the Letter of Intent dated December 9, 1991 be accepted by Glendale. Accordingly, I signed and dated that document on December 21, 1991 and personally mailed it by first class mail to Mr. Sorensen at P.O. Box 5333, Ft. Lauderdale, FL

- 2 -

72120 The attached letter is a true and correct copy of the

Miami, FL 1V

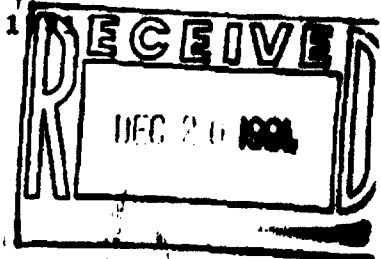


Letter of Intent to Negotiate an Agreement

09 December 1991

Mr. Gregory B. Daly
TelSA, Inc.
P. O. Box 32223
Washington, D.C. - 20007-0523

CERTIFIED



REF: Glendale Broadcasting Corporation

John L. ...

Dear Mr. Daly:

Thank you for your interest in leasing, or assuming a lease, for tower space at our facility in Miami / Ft. Lauderdale, being that specific steel transmission tower located at 3300 Pembroke Road, Pembroke Park, Florida and also known as Stainless, Inc. Tower Nr. 2182, FAA/FCC tower Nr. 1002 and to the trade as "Candleabra".

We have reviewed your standard letter of intent and prefer to send this letter to you which more accurately spells out our understanding of the requirements of your client and our willingness to try and meet those requirements.

BY THIS LETTER, TAK Broadcasting Corporation ("TBC") extends to your client, Glendale Broadcasting Corporation ("Glendale"), an offer to negotiate a new lease for the tower space now held by WHFT-TV on our tower if:

- a) Glendale is a qualified licensee for the operation of the facility in question. Glendale represents that it now holds other similar Licenses, Construction Permits, or other vehicles of authority from the FCC, and that it now holds a valid FCC Construction Permit or Station Operating License for the facilities of WHFT-TV or will do so at the outset of any negotiations which may result from this agreement.
- b) Glendale is able to enter into a lease from TBC and to perform to the specifications of such a lease under Florida Law.

structural report generated by the Engineering Department of Stainless, Inc. and by the most recent Existing Conditions Report and Opinion of the Chief Engineer of TBC. The failure of the apparatus of the tenant to meet these requirements will render this offer and any subsequent offer, option, or agreement from TBC null and void.

i) Estimated annual rental for the space currently occupied by WHFT-TV is \$100,000 with additional ground space for other apparatus at an estimated \$10.00 per square foot. TBC stipulates that it supplies to WHFT-TV no ground space for equipment since WHFT-TV has it's own building on it's own property for this purpose. [The verbally quoted figure of \$50,000 assumed that the TelSA, Inc. client was an FM broadcaster, not a TV operator. The figures of \$50,00 for FM and \$100,000 for TV are at fair market value for the Miami / Ft. Lauderdale / Palm Beach TV ADI. TBC has at this time available space for the installation of one (1) full power UHF television transmitter and has land available for the construction of a building for this purpose if necessary.]

j) The offer to negotiate contained herein is only valid for the purpose of the aquisition of WHFT-TV and cannot be honored for the purpose of new construction except if the apparatus of WHFT is removed from the tower under the control of engineering studies made by TBC and Stainless, Inc.

k) Technical data for this tower is shown on the attached TelSA, Inc. Technical Data Sheet and is correct for the purposes stated herein. [More detailed technical data on this tower is available from the Chief Engineer, TAK Broadcasting Corporation, Ft. Lauderdale, Florida - 33311.]

l) This agreement is only between TBC and Glendale and the inclusion of TelSA, Inc. is only for the purpose of limiting TBC's tender of and TelSA's acceptance of this agreement as full compensation for any service it may have rendered to TBC in the course of serving it's client and is executed by TelSA, Inc. as evidence of such.

m) Items contained within brackets ("[]") are informational or advisory only and do not constitute a part of this agreement.

We hope that this letter is satisfactory for your purposes as it encompasses those areas in which we are able to make and honor an offer. Be assured that all discussions and negotiations with our tenants and proposed tenants are treated with the highest confidentiality.

Please let us know if we may be any additional service to you or Glendale Broadcasting Corporation.

Sincerely,

TAK BROADCASTING CORPORATION

James L. Sorenson
Tower Manager -- Chief Engineer

cc: Mr. Tak
Mr. Harris

ACCEPTED:

For Glendale Broadcasting Corporation

Witness:

Title

For TelSA, Inc.

Witness:

Ernest R. Nally 12/2/91
President

Title

copy mailed 12/2/91 to TALK B'ld

DECLARATION

I, Lewis I. Cohen, under penalty of perjury declare that the following is true and correct to the best of my knowledge.

Cohen & Berfield, P.C., in which I am a Principal, is counsel to Glendale Broadcasting Company (Glendale), which is an applicant seeking the facilities now licensed to Trinity Broadcasting of Florida, Inc. (Trinity) in Miami, Florida. When Trinity filed its Petition to Enlarge Issues against Glendale requesting site availability issues, I asked Greg Daly, whom Glendale had retained to obtain reasonable assurance of a transmitter site, to review his file on this matter. Daly provided me from his files a copy of a letter signed by Daly and mailed by him on December 21, 1991, to James L. Sorensen, Tower Manager & Chief Engineer of TAK Broadcasting Company (TAK) accepting TAK's Letter of Intent to Negotiate an Agreement. The letter of intent was dated December 9, 1991. It is attached hereto.

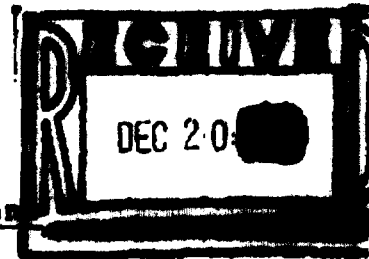
I telephoned Mr. Sorensen on May 14, 1993, to tell him that I was sending him a copy of Mr. Daly's acceptance of TAK's Letter of Intent to Negotiate an Agreement. Mr. Sorensen told me that he may have received Daly's copy of that letter but that his files did not reflect it. I told Mr. Sorensen that Glendale wanted TAK to reaffirm that TAK's site was still reasonably available to Glendale.

On May 15, 1993, I received a fax from Mr. Sorensen which is attached hereto. I responded to Mr. Sorensen by telephone on May 17. He told me that the matter of making TAK's site reasonably available to Glendale was being discussed with TAK's counsel, and

that I would hear from TAK in the near future. On May 21, in response to calls to Mr. Sorensen from me, he left a message that David Harris, General Manager of Tak, would be speaking to me.

T. spoke to Mr. Harris on May 21 by telephone. He told me

Madam, FL . 1 V

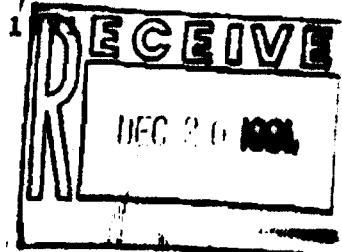


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P. O. Box 22223
Washington, D.C. - 20007-0523

CERTIFIED



REF: Glendale Broadcasting Corporation

2nd letter, center

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